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IssueDate: 23October2006

CASENO 2004-BLA 05652

IntheMatterof

L.S.,

Claimant,

v.

BLED SOE COAL CORPORATION ,

Employer,

and

JAMES RIVER COAL COMPANY,

Carrier,

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS ,**

Party-in-interest.

Appearances:

MONICA RICESMITH, Esq.,
For Claimant

LOISA KITTTS, Esq.
For Employer/Carrier

Before:

JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the eBlack Lung Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

¹The Department of Labor ("DOL") has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at C.F.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung disease, is a dust disease of the lungs resulting from coal dust inhalation.

On January 22, 2004, this case was referred to the Office of Administrative Law Judges (“OALJ”) for a formal hearing. Subsequently, the case was assigned to me. On May 10, 2006, in Hazard, Kentucky, the parties appeared at a hearing and had full opportunity to present evidence and argument.² The following decision is based upon a thorough review of the evidentiary record, the arguments of the parties and an analysis of the applicable law.

I. ISSUES

- (1) Whether the claim was timely filed;
- (2) Whether Employer Bledsoe Coal Corporation is the properly named responsible operator pursuant to 20 C.F.R. §§ 725.491- 725.494;
- (3) Claimant’s length of coal mine employment ;
- (4) Whether Claimant has pneumoconiosis pursuant to 20 C.F.R. § 718.202;
- (5) Whether Claimant’s alleged pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. § 718.203;
- (6) Whether Claimant is totally disabled pursuant to 20 C.F.R. § 718.204(b); and
- (7) Whether Claimant’s alleged pneumoconiosis is substantially contributed to his alleged total disability pursuant to 20 C.F.R. § 718.204(c).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

On May 23, 2002, Claimant filed a claim for federal black lung benefits with the United States Department of Labor, Director of Office of Workers’ Compensation Programs (“OWCP” or “Director”). DX -2. By Proposed Decision and Order issued September 30, 2003, the Director denied benefits, finding that Claimant had established five (5) years of coal mine employment but had not established any of the four elements of entitlement. DX -17. The Director named Bledsoe Coal Corporation (“Employer”) as the responsible operator. Id. By correspondence

Parts 718, 722, 725, and 726 (2002). They are applicable to all claims pending, on, or filed after that date. See 20 C.F.R. § 718.101(b) (2001); 20 C.F.R. § 725.2(c) (2001). Since Claimant’s current claim was filed on May 23, 2002, the revised regulations apply to his claim. The United States Court of Appeals for the District of Columbia has upheld the validity of the revised regulations. See National Mining Assoc. v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002).

²In this Decision and Order, “DX -#” refers to Director’s Exhibits; “CX -#” refers to Claimant’s Exhibits; “EX -#” refers to Employer’s Exhibits and “Tr. at -” refers to the Hearing Transcript of May 10, 2006.

dated October 21, 2003, Claimant requested a hearing before OALJ in order to contest the Director's denial. DX -29.

On January 22, 2004, this claim was referred to OALJ for a formal hearing. DX -34. The claim was originally assigned to Administrative Law Judge ("ALJ") Daniel J. Roketenetz but was thereafter continued for good cause. The claim was then reassigned to me. I scheduled a hearing for May 10, 2006 in Hazard, Kentucky, at which time the Claimant appeared and testified and evidence was admitted to the record. Claimant submitted a post-hearing brief³ on July 14, 2006 and Employer's post-hearing brief⁴ was received on September 12, 2006.

B. Factual Background

1) Stipulations of the Parties/Uncontested Issues

The parties have stipulated to the following issues and facts which are not contested:

1. Claimant is a miner (DX -34); and
2. Claimant worked as a miner after December 31, 1969 (DX -34).

2) Claimant's Testimony (Tr. at 13 -34)

Claimant was born on October 12, 1956 and has a ninth grade education. Tr. at 13. He has been legally married to his wife for twenty-six years and has a fifteen year old son. Tr. at 13 -14.

Claimant first worked in coal mine employment at Arthur Napier [a.k.a. A and G Coal] as a youth for six to eight months and was only paid cash because he was "underage." Tr. at 16. He then worked at Mary Beth, beginning around the year 1972. Tr. at 15, 16. Claimant recalls working for Mary Beth on only one occasion despite the fact that his social security earnings record reflect employment for Mary Beth in the years 1977, 1978, and 1979. Tr. at 17. Claimant candidly admitted: "Dates, I can't tell you now." Tr. at 17. Claimant remembered that he worked for Leeco in the years 1975 and 1976 (Tr. at 17) for "around a year" (Tr. at 18). His work consisted of setting jacks for a miner. Tr. at 18. Claimant then did some work for Witt Sheet Metal Shop in the year 1976 for three to six months. Tr. at 18, 19. Witt's Sheet Metal Shop was actually the name of a mine and Claimant ran the drill for them. Tr. at 19. In 1980, Claimant worked for G and Y Coal Company for about three to six months cutting coal, for which he was paid in cash. Tr. at 20. In 1981, Claimant worked about eight months for Combs and Hurley Coal Company. Tr. at 20 -21. In 1983, Claimant began working for Employer. Tr. at 21. He worked there until 1985 cutting coal in a very dusty environment. Tr. at 21. In 1987, Claimant went to work for Pine Coal but only worked there for two months before they shut down. Tr. at 22. He then worked in coal mine employment at Rand S Repair and Triple C and G, again working only a couple of months for each entity. Tr. at 22 -23. Claimant's coal mine

³ Denoted as "CBat -."

⁴ Denoted as "EBat -."

employment required him to do a lot of heavy lifting, including lifting seventy-five to eighty pound jacks. Tr. at 23.

Claimant currently suffers from back problems that relate to his employment at Leeco. Tr. at 23. He has received back treatment from Dr. Light at a pain center in Manchester for fourteen years. Tr. at 25. Claimant was also shot in his right lung and between the eyes. Tr. at 24. He had surgery on his chest in 1983 because of the gunshot in which "they had to plaster bottom part of [Claimant's] right lung off." Tr. at 24. Moreover, Claimant suffers from breathing difficulties that he treats with an inhaler on an as-needed basis. Tr. at 25. He has also utilized a nebulizer for the past three years which was prescribed by Dr. Varghese. Tr. at 26. Claimant's breathing difficulties preclude him from doing such activities as hunting with his son and they cause him difficulty sleeping. Tr. at 28.

On cross-examination, Claimant testified that he was never married to his wife by a judge or minister in the State of Kentucky. Tr. at 30. They did, however, live in the State of Florida together for six years from "1998 up to somewhere, 2001 or something." Tr. at 31. The couple does not have a marriage license, however. Tr. at 31.

Claimant began smoking cigarettes when he was about seventeen years old. Tr. at 33. He quit smoking cigarettes about a year and a half ago but still occasionally lights up a cigar. Tr. at 32. He last smoked a cigarette a week ago when he lit one up for his wife. Tr. at 33. He last smoked on a regular basis about a year ago. Tr. at 33. The amount of cigarettes that Claimant smoked on a given day when he smoked on a regular basis depended on how many beers he drank. Tr. at 33. He estimated that he smoked about a half pack per day at his peak. Tr. at 33.

C. Timeliness of the Claim

Employer raised the issue of whether the claim was timely filed. Pursuant to the Act and regulations, a claim for benefits must be filed within three years after a medical determination of total disability due to pneumoconiosis is communicated to the Miner. See 20 C.F.R. § 725.308. The regulations provide that "there shall be a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. § 725.308(c); Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602, 606 (6th Cir. 2001) ("Claims for black lung benefits are presumptively timely"). The party opposing entitlement must demonstrate that the claim is untimely and there are no "extraordinary circumstances" under which the limitation for filings should be tolled. Daugherty v. Johns Creek Elkhorn Coal Corp., 18 B.L.R. 1 -95 (1994).

Employer's assertion that this claim was not timely filed is completely without merit. Employer argues in its brief:

Specifically, the claimant stated on his application that he last worked in 1986. The claimant has now filed a federal claim and the claim was filed well in excess of the three-year statute of limitation time period. The miner has not explained why he waited so long to file this claim.

EBat 11. This argument fails on two grounds. First, the three-year statute of limitations begins to run on a claim when the miner has a *medical determination* of total disability due to pneumoconiosis ~~communicated to him~~ it does not begin to run when Claimant suspends or ends his coalmine employment. Second, the burden to establish that the claim was not timely filed lies with Employer. Claimant need not explain any delay in deciding to file his claim many years after his coalmine employment ended. In this case, Claimant filed his claim on May 23, 2002. DX -2. In addition, since the regulations recognize that pneumoconiosis is a latent and progressive disease, it is not unusual for a claim to be filed well after the cessation of coalmine employment. My review of the record discloses no evidence that a medical determination of total disability due to pneumoconiosis was communicated to Claimant more than three years prior to the date his claim was filed. Accordingly, I find that the claim was timely filed.

D. Responsible Operator

Employer has continuously contested its designation as the named responsible operator in this claim. See e.g., DX -28. However, Employer has declined to brief that issue before me.

Liability for payment of benefits to eligible miners is assessed against the most recent operator which meets the requirements at 20 C.F.R. §§ 725.491 -725.494. The relevant requirement in this case is that, in order for an operator to be considered a “potentially liable operator,” the miner must have been employed by the operator for a cumulative period of not less than one year. 20 C.F.R. § 725.494(c). Therefore, if there is more than one operator for whom the Miner worked a cumulative total of at least one year, liability is imposed on the most recent employer. Snedekerv. Island Creek Coal Co., 5 B.L.R. 1 -91 (1982).

Claimant’s social security records show earnings for Bledsoe Coal Corporation in the years 1983, 1984, and 1985. DX -5. Claimant’s testimony confirms that he worked for Employer during those years. Tr. at 21. Therefore, I find that Claimant worked for Bledsoe Coal Corporation for a cumulative period of more than one year. Claimant’s social security records also reveal his coalmine employment after Bledsoe Coal Corporation at Leecoin in 1986, Pine Coal in 1987, R&S Repair Service in 1990, and Triple C & G Coal, Inc., in 1990. Claimant testified that he was not employed by anyone of these operators for a period of one year or longer. Tr. 22 -23. The records corroborate his testimony. Employer has failed to proffer evidence or argument to contradict the evidence. Accordingly, I find that Bledsoe Coal Corporation is the most recent potentially liable operator of which Claimant was employed for a cumulative period of at least one year, and is the properly named responsible operator.

E. Length of Coal Mine Employment

The duration of a miner’s coalmine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of establishing the length of his coalmine work. See Shelesky v. Director, OWCP, 7 B.L.R. 1 -34, 1- 36 (1984); Rennie v. U.S. Steel Corp., 1 B.L.R. 1 -859, 1- 862 (1978). The Act fails to provide specific guidelines for computing the length of a miner’s coalmine work. However, the Benefits Review Board consistently has held that a reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coalmine employment. See

Crouch v. Director, OWCP, 20 B.L.R. 1-67, 1-72 (1996) (en banc); Dawson v. Old Ben Coal Co., 11 B.L.R. 1-58, 1-60 (1988). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. Calfee v. Director, OWCP, 8 B.L.R. 1-7, 1-9 (1985).

In this claim, the Director found that Claimant had established five and a half (5.5) years of coal mine employment from November 1975 to 1990. DX -27. Although Employer has not contested this issue (See DX -34), Claimant has not formally stipulated to that finding. My review of Claimant's social security records and his testimony reveals the following coal mine employment:

Operator	Year of Employment	Length of Employment	Exhibit(s)
1. Arthur Napier	1972	6 months	Tr. at 16
2. Leeco Inc.	1975	3 months	DX-5; Tr. at 17
3. Whitt Sheet Metal Shop	1976	3 months	DX-5; Tr. at 19
4. Mary Beth Coal Co./C&S Fuels, Inc.	1977-1979	36 months	DX-5; Tr. at 19 -20
5. G&Y Coal Co., Inc.	1980	3 months	DX-5; Tr. at 20
6. Combs & Hurley Coal	1981	8 months	DX-5; Tr. at 21
7. Cardinal Resources	1983	9 months	DX-5; Tr. at 22
8. Bledsoe Coal Corporation	1983-1985	27 months	DX-5; Tr. at 22
9. Leeco Inc.	1986	2 months	DX-5
10. Pine Coal Corp.	1987	2 months	DX-5; Tr. at 22
11. R&S Repair Service	1990	2 months	DX-5 Tr. at 22 -23
12. Triple C & G Coal Co.	1990	2 months	DX-5; Tr. at 23
Total: 103 months= 8.6 years of coal mine employment			

Based upon the foregoing findings, which I have reached by assessing both the Claimant's social security records and his testimony at the May 10, 2006 formal hearing, I find that Claimant has established 8.6 years of coal mine employment.

F. Entitlement

Benefits are provided under the Black Lung Act for miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a). "Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. § 718.201(a). Because this claim was filed subsequent to January 19, 2001, Claimant's entitlement to benefits will be evaluated under the revised regulations set forth at 20 C.F.R. Part 718. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner has pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's pneumoconiosis contributes to his total disability. 20 C.F.R. § 725.202(d)(2)(i) -(iv); See Director, OWCP v.

Greenwich Colliers, 512 U.S. 267 (1994); Perry v. Director, OWCP, 9 B.L.R. 1-1, 1-2 (BRB 1986).

1) Whether the Miner Has Pneumoconiosis

A finding of the existence of pneumoconiosis is determined pursuant to 20 C.F.R. § 718.202. In addition, the regulations permit an ALJ to give appropriate consideration to “the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tend to demonstrate the presence or absence of pneumoconiosis.” 20 C.F.R. § 718.107(a). Finally, the Benefits Review Board (“the Board”) has held that all evidence relevant to the existence of pneumoconiosis must be considered and weighed. Mabey v. Bishop Coal Co., 9 B.L.R. 1-67 (1986) (the Board upheld a finding that the claimant had not established the existence of pneumoconiosis even where the X-ray evidence of record was positive).

20 C.F.R. § 718.202(a) Evidence

There are four means of establishing the existence of pneumoconiosis set forth at 20 C.F.R. §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).

(2) Biopsy or autopsy evidence: § 718.202(a)(2).

(3) Regulatory presumptions: § 718.202(a)(3):

(a) § 718.304- Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

(b) § 718.305- Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

(c) § 718.306- Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

and

(4) Physician’s opinions based upon objective medical evidence: § 718.202(a)(4).

The following is a discussion of the § 718.202(a) evidence of record:

1. Chest X-Ray Evidence - § 718.202(a)(1).

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102.⁵ An ALJ may utilize any reasonable method of weighing the X-ray evidence. Sexton v. Director, OWCP, 752 F.2d 213 (6th Cir. 1985). Generally, a physician's qualifications at the time he/she renders an interpretation should be considered. Aimone v. Morrison Knudsen Co., 8 B.L.R. 1132 (1985). It is well established that it is proper to credit the interpretation of a duly qualified (B-Reader and BCR) physician over the interpretation of a physician who is solely a B-Reader. Zeigler Coal Co. v. Director, OWCP [Hawker], 326 F.3d 894 (7th Cir. 2003) (complicated pneumoconiosis); Cranor v. Peabody Coal Co., 22 B.L.R. 111 (1999) (*en banc on recon.*); Sheckler v. Clinchfield Coal Co., 7 B.L.R. 1128, 131 (1984). The Board has also held that greater weight may be accorded the X-ray interpretation of a duly qualified physician over that of a physician who is only a BCR. Herald v. Director, OWCP, BRB No. 94-2354 BLA (Mar. 23, 1995) (unpublished). In addition, an ALJ is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 116 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 11544 (1984); Glezav. Ohio Mining Co., 2 B.L.R. 11436 (1979).

The current record contains the following admissible chest X-ray evidence :

Date of X-Ray	Date Read	Exhibit No.	Physician	Radiological Credentials	Film Quality	Interpretation
(1)						
08/14/02	08/14/02	DX-8	Hussain	None	1	1/0
08/14/02	09/15/02	DX-8	Barrett	B-Reader; BCR	1	Quality reading
08/14/02	01/08/03	DX-8	Poulos	B-Reader; BCR	1	No evidence of pneumo.
(2)						
09/30/02	09/30/02	EX-1	Rosenberg	B-Reader	1	0/0
(3)						
03/24/05	03/24/05	EX-4	Broudy	B-Reader	1	0/0

As the preceding table demonstrates, three X-rays of Claimant's chest and four relevant readings are pertinent to this adjudication. The first X-ray was performed on August 14, 2002 and read as Category 1/0 positive for the presence of pneumoconiosis by Dr. Imtiaz Hussain. The same X-ray was also interpreted as showing no evidence of pneumoconiosis by Dr. Alex Poulos. Dr. Peter Barrett rendered a reading for quality purposes only. Dr. Poulos is a duly qualified physician while Dr. Hussain has no radiological credentials. I accord greater weight to

⁵ AB-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

the interpretation of Dr. Poulos because of his qualifications and find that the August 14, 2002 X-ray does not support a finding of pneumoconiosis.

Employer also submitted a September 30, 2002 X-ray reading by Dr. David Rosenberg and a March 24, 2005 X-ray reading by Dr. Bruce Broudy. Both of those physicians are recertified B-Readers and both of them interpreted their respective X-rays as Category 0/0 negative for pneumoconiosis. Because their readings remain unrebutted, I find that neither of those X-rays support a finding of pneumoconiosis.

I find that the preponderance of the X-ray evidence is negative for pneumoconiosis. Accordingly, I find that Claimant has failed to establish the presence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1).

2. Biopsy or autopsy evidence - § 718.202(a)(2).

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. 20 C.F.R. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

3. Regulatory presumptions - § 718.202(a)(3).

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because the claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions are applicable, the existence of pneumoconiosis has not been established pursuant to 20 C.F.R. § 718.202(a)(3).

4. Physicians' opinions - § 718.202(a)(4).

The fourth way to establish the existence of pneumoconiosis under § 718.202(a) is set forth as follows in subparagraph (4):

A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such findings shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." A "reasoned opinion" is one that contains underlying documentation adequate

to support the physician's conclusions. Fieldsv. Island Creek Coal Co., 10 BLR 1 -19, 1- 22 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data on which the physician based his diagnosis. Fullerv. Gibraltar Coal Co., 6 B.L.R. 1-1291 (1984). An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst -Robbins Coal Co., 12 BLR 1 -149, 1 -155 (1989).

Therecord contains the following physicians' opinion evidence:

Dr. Imtiaz Hussain, M.D. (DX -8; CX -1)

Dr. Hussain is a Diplomate of the American Board of Internal Medicine with a Subspecialty in Pulmonary disease. CX -1. He performed a full OWCP pulmonary evaluation of the Claimant on August 14, 2002. DX -8. Attached to Dr. Hussain's report was a coal mine employment history Form CM -911a and the doctor noted a smoking history from age 14 through the year 1995 of a one -half pack of cigarettes per day. Dr. Hussain reported the following clinical findings: presence of pneumoconiosis on X -ray; airway obstruction on pulmonary function testing; resting hypoxemia on blood gas study; and normal EKG findings. Based upon these findings, Dr. Hussain diagnosed Claimant with pneumoconiosis and chronic obstructive pulmonary disease ("COPD"). He listed dust exposure and tobacco use as the etiology of his diagnosis. He also opined that Claimant suffered from a mild impairment that was 60% attributable to pneumoconiosis and 40% attributable to COPD. Dr. Hussain was of the opinion that Claimant does retain the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment.

Medical Reports from Mary Breckinridge Hospital (DX -22)

Claimant submitted numerous medical reports from Mary Breckinridge Hospital. DX -22. On an X -ray report signed by Dr. Mahender Pampati, M.D., he notes, "Bronchitis is suggested. Chronic obstructive pulmonary disease cannot be excluded. There is no shift of midline structures. No evidence of pleural effusion or pneumothorax." Outpatient not assessed by Dr. Roy Varghese reveal that Claimant was being treated for severe lumbago, sciatica, herniated disc, severe anxiety, depression, and paranoid feelings. Outpatient not assessed by Dr. Ashutosh Mishra are consistent with Dr. Varghese's notes.

Dr. David Rosenberg, M.D. (EX -1; EX -2; EX -3)

Dr. Rosenberg is Board -certified in Internal Medicine, Pulmonary Disease, and Occupational Medicine. He is also a certified Board -Reader. EX -3.

Dr. Rosenberg examined Claimant on September 30, 2002 and prepared a report dated April 12, 2005. EX -1. Dr. Rosenberg also reviewed Dr. Hussain's evaluation (he noted that he believed the effort on Dr. Hussain's spirometry tests appeared incomplete) and the Mary Breckinridge Hospital records (suggestive of bronchitis and some rhonchi heard). Dr. Rosenberg noted a smoking history of one -half pack to one pack of cigarettes per day for about six or seven years and a coal mine employment history of five to six years underground and a total of ten to fourteen years. Dr. Rosenberg reported the following clinical observations: lungs clear without

rales, rhonchi, or wheezes on physical examination; EKG unremarkable; no obstruction or restriction on pulmonary function testing despite poor efforts; normal gas exchange on blood gas study; increased carboxyhemoglobin level; and X-rays do not reveal micronodularity. Based upon these findings, Dr. Rosenberg opined that Claimant "does not have the medical or clinical form of coal workers' pneumoconiosis." He also opined that Claimant does not suffer from COPD and, "from a pulmonary perspective, he could perform his previous coal mining job or similarly arduous types of labor."

Dr. Rosenberg testified at deposition on May 13, 2005. EX -3. He testified that breathing abnormalities associated with cigarette smoking are noticed when a patient exhales while abnormalities associated with coal workers' pneumoconiosis are noticed when a patient inhales. EX-3 at 8. He also testified that coal workers' pneumoconiosis radiologically causes micro nodules which are predominantly focused in the upper lung zones and tend to be central. EX -3 at 10. The doctor explained that when arterial blood gas study values rise on exercise, it is an indication that there really is no interstitial lung disease occurring. EX -3 at 16. Dr. Rosenberg stated that it would be unlikely that a person with eight years of coal dust exposure would have radiographic evidence of coal workers' pneumoconiosis, but he would not automatically exclude the possibility. EX -3 at 17. Dr. Rosenberg concluded that Claimant is not disabled from a respiratory perspective and retains the respiratory capacity to return to his previous job in and around the mining industry. EX -3 at 24 -25.

Dr. Bruce Broudy, M.D. (EX -4; EX -5)

Dr. Broudy is a Board -certified pulmonary specialist and a certified Board -Reader. EX -5. He performed an occupational pulmonary disease evaluation of the Claimant on March 24, 2005 and prepared a report dated the same. EX -4. He noted a coal mine employment history of twelve to fifteen years and a smoking history of one -half pack per day beginning at the age of seventeen. Dr. Broudy also noted that Claimant was hospitalized recently and found to have a spot on his lung as evidenced by CT scan. Claimant complained of sharp central and bilateral anterior chest pain. Dr. Broudy reported the following clinical observations: physical examination revealed abdominal obesity and clear lungs; spirometry testing revealed a mild restrictive defect; diffusing capacity is slightly reduced; blood gases show mild hypoxemia; carboxyhemoglobin testing indicated continued exposure to smoke; and chest X-rays were interpreted as Category 0. Based upon these findings, Dr. Broudy opined that there is no evidence Claimant has coal workers' pneumoconiosis, silicosis or any chronic lung disease caused by the inhalation of coal mine dust and retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. He also opined that he suspects Claimant's mild restrictive impairment is related to cigarette smoking because of the evidence that Claimant continues to experience exposure to smoke.

At this deposition on April 15, 2005, Dr. Broudy testified that Claimant does have a sufficient occupational history to result in the development of coal workers' pneumoconiosis in a susceptible miner [based on 12 to 15 years of underground mining]. EX -5 at 7. But the doctor believed that Claimant's history of cigarette smoking was sufficient for a susceptible smoker could develop smoke -related lung diseases. EX -5 at 8. Despite Claimant's complaints, Dr. Broudy did not detect evidence of wheezing. EX -5 at 9. Dr. Broudy found scattered

calcification on X-ray. EX -5at10. He explained that the calcifications were complete calcification of a nodule, thereby making it far more likely that the calcification they represented was granuloma than any type of dust nodule. EX -5at10. Dr. Broudy was unable to perform an exercise blood gas study on Claimant because Claimant's back problems do not allow him to exercise very well. EX -5at12. Dr. Broudy testified that it was his opinion that Claimant's obesity and history of cigarette smoking were the cause of the mild restriction seen in spirometric results as well as the mild hypoxemia seen in the blood -gas analysis. EX -5at12. On cross-examination, Dr. Broudy testified that the inhalation of coal dusts can cause a restrictive defect. EX -5at16.

20C.F.R. §718.107(a) : "Other Medical Evidence"

20C.F.R. §718.107(a) allows an ALJ to give appropriate consideration to the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tend to demonstrate the presence or absence of pneumoconiosis. The party submitting the test or procedure bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits. 20C.F.R. §718.107(b).

There has been no evidence submitted in this claim that would qualify as "other medical evidence" under 20C.F.R. §718.107(a).

Discussion

Dr. Hussain concluded that legal pneumoconiosis was present. If I find that Dr. Hussain's opinion merits the least weight of all of the opinions because it rests in part upon the positive interpretation of the August 14, 2002 X-ray film. However, as has been noted, Dr. Poulos, a physician with specific radiological credentials, subsequently read the same film and interpreted it as not evidencing pneumoconiosis. As such, Dr. Hussain's reliance on that X-ray diminishes the reliability of his opinion. Furthermore, Dr. Hussain does not offer a comprehensive explanation as to why he diagnoses legal pneumoconiosis, or why he assigned proportionate values of etiology for Claimant's mild pulmonary impairment between his coal mine dust exposure and history of smoking. In his report, Dr. Hussain posed the question of "what is the basis of [his] diagnosis [of an occupational lung disease which was caused by coal mine employment]?" The doctors simply responded "X-ray findings and history of exposure." Because I have given little weight to the doctor's positive X-ray interpretation, his opinion is flawed.

In addition, Dr. Hussain never reported what length of coal mine employment he was actually relying upon. Under "Employment History" on his Form CM -988, he simply checked off the box noting that a Form CM -911 was attached. My review of the attached Form CM -911 reveals that it is ambiguous and inconclusive as to the extent of Claimant's coal mine employment. It only includes the start dates of each of Claimant's places of employment. It does not include the end dates. It would be reasonable to infer that Dr. Hussain was relying on as much as a twenty-two year employment history [uninterrupted employment from 1974 through 1996]. That would be much greater than the eight and a half years of coal mine

employment that I have calculated. Therefore, I find that Dr. Hussain's report is not well documented.

In contrast, Drs. Rosenberg and Broudy each documented the precise coal mine employment history they relied upon. It should be noted that both of their opinions are based upon a coal mine employment history more favorable to Claimant's claim than I have actually found [Dr. Rosenberg noted ten to fourteen years total while Dr. Broudy noted twelve to fifteen years]. Dr. Rosenberg even testified at this deposition that an eight-year coal mine history would be sufficient exposure for a diagnosis of pneumoconiosis. However, neither of those physicians were of the opinion that the medical evidence was sufficient for a diagnosis of legal pneumoconiosis. In fact, although Dr. Broudy found evidence of a mild restrictive respiratory impairment, he testified that it was not attributable to coal dust exposure but rather to Claimant's history of cigarette smoking. I find that both the opinions of Dr. Rosenberg and Dr. Broudy are well-documented and well-reasoned. Their medical conclusions are much more comprehensively explained than that of Dr. Hussain, and entitled to more probative weight.

In consideration of the medical opinion evidence, I find that it fails to establish that Claimant has pneumoconiosis.

Considering all of the evidence together, I find that it does not establish that Claimant has pneumoconiosis.

2) Whether Pneumoconiosis Arose Out of Coal Mine Employment

In order for a claimant to be found eligible for an award of benefits, it must be determined that his or her pneumoconiosis "arose at least in part out of coal mine employment." 20 C.F.R. § 718.203(a). In the present case, because I found that Claimant worked less than ten years of coal mine employment (8.6 years), if Claimant had established that he had pneumoconiosis, he would have also had to establish the requisite relationship between his employment and pneumoconiosis by way of "competent evidence." 20 C.F.R. § 718.203(c). Because Claimant has not successfully established the threshold matter of whether he has pneumoconiosis, by implication the issue of causation is resolved. Accordingly, analysis under this prong is unnecessary. ⁶

3) Whether the Miner is Totally Disabled

In addition to establishing the presence of coal workers' pneumoconiosis, in order for a claimant to prevail under the Act, he or she must establish that they are totally disabled due to a respiratory or pulmonary condition. 20 C.F.R. § 718.204(a). A miner is considered totally disabled within the Act if "the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

- (i) From performing his or her usual coal mine work; and
- (ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment

⁶ I note that Claimant failed to argue this element of entitlement in his brief.

inamineorminesinwhichheorshepreviouslyengagedwithsomeregularity overasubstantialperiodoftime.”

20C.F.R. §718.204(b)(1). Theregulationsat20C.F.R. §718.204providethefollowingfive methodstoestablishtotaldisability:(a)pulmonaryfunctionstudies;(b)arterialbloodgas studies;(c)evidenceofcorpulmonale withright -sidedcongestiveheartfailure;(d) reasoned medicalopinions;and(e)laytestimony.20C.F.R. §§718.204(b)(2)(i) -(iv)and(d).However,in alivingminer’sclaim,afindingoftotaldisabilityduetopneumoconiosisshallnotbemade solelyontheminer’sstatementsortestimony.20C.F.R. §718.204(d)(5); Tedesco v. Director, OWCP, 18B.L.R. 1 -103(1994).Further,a presumptionoftotaldisabilityisnotestablishedbya showingofevidencequalifyingunderasubsectionof§ 718.204(b)(2),butrathersuch evidence shallestablishtotaldisabilityintheabsenceofcontraryevidenceofgreaterweight. Gee v. W.G. Moore & Sons, 9B.L.R. 1 -4(1986).Allmedicalevidencerelevanttothequestionoftotal disabilitymustbeweighed,likeandunliketogether,withClaimantbearingtheburdenof establishingtotaldisabilitybyapreponderanceoftheevidence. Rafferty v. Jones & Laughlin Steel Corp., 9B.L.R. 1 -231(1987).

a) *Pulmonary Function Studies*

Inordertodemonstratetotalrespiratorydisabilityonthebasisofpulmonaryfunction studyevidence,aclaimantmayprovidestudies,which,afteraccountingforsex,age,andheight, produceaqualifyingvaluefortheFEV₁test,andproduceeither aqualifyingvaluefortheFVC testorthemVVtest,orproduceavalueofFEV₁dividedbytheFVClessthanorequalto55 percent.“Qualifyingvalues”fortheFEV₁,FVCandtheMVVtestsaremeasuredresultsless thanorequaltovalueslistedintheappropriatetables ofAppendixBto20C.F.R. Part718,20 C.F.R. §718.204(b)(2)(i).

Thefollowing pulmonaryfunctionstudies(“PFSs”)arecontainedintherecord:

Date	EX.No.	Physician	Age/ Ht.	FEV ₁	FVC	MVV	FEV ₁ /FV C	Effort	Qualifies
08/14/02 ⁷	DX-8	Hussain	45 ⁸ 72”	3.00 2.86*	4.31 3.90*	58	69.6% 73.3%*	Good	NO NO* FEV ₁ :2.46
09/30/02	EX-1	Rosenberg	45 72”	3.25	4.45	79	73%	Fair	NO FEV ₁ :2.46
03/24/05	EX-4	Broudy	48 71”	2.62	3.67	45	71%	Fair	NO FEV ₁ :2.32

*post -bronchodilator

Astheprecedingtabledemonstrates,noneofthePFSsofrecordproducedqualifying valuesunderthefederalregulations. Accordingly,IfindthatClaimanthasfailedtodemonstrate totaldisabilitypursuantto20C.F.R. §718.204(b)(2)(i).

⁷Dr. Matthew Vuskovich, M.D., invalidated the August 14, 2002 PFS administered by Dr. Hussain. EX

-6.

⁸Dr. Hussain noted on his report that Claimant was 47 years of age but I find that Claimant was actually aged 45 years as of the date of that PFS.

b) Arterial Blood Gas Studies

To establish total disability based on Arterial Blood Gas Studies, the test must produce the totals presented in the Appendix C to 20C.F.R. Part 718, 20C.F.R. § 718.204(b)(2)(ii).

The record contains the following arterial blood gas study ("ABGs") evidence summarized below:

Date	EX.No.	Physician	Altitude	pCO ₂	pO ₂	Qualifies ⁹
08/14/02	DX-8	Hussain	0-2999 ft.	42.8 34.7*	65.0 96.0*	NO (60) NO* (66)*
09/30/02	EX-1	Rosenberg	0-2999ft.	37.5	84.1	NO (62)
03/24/05	EX-4	Broudy	0-2999ft.	35.9	71.2	NO (64)

*Values observed during exercise

As the preceding table demonstrates, none of the ABGs of record produce disqualifying values under the federal regulations. Accordingly, I find that Claimant has failed to demonstrate total disability pursuant to 20C.F.R. § 718.204(b)(2)(ii).

c) Reasoned Medical Opinion

The fourth method for determining total disability is through the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful employment. Such an opinion must be based on acceptable clinical and laboratory diagnostic techniques. 20C.F.R. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Fields v. Island Creek Coal Co., 10 BLR 1 -19, 1- 22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst -Robbins Coal Co., 12 BLR 1 -149, 1- 155 (1989).

All three physicians of record, including Dr. Hussain, opined that Claimant retains the respiratory capacity to perform the work of a coal miner or to perform comparable work.

d) Lay Testimony

Claimant testified that he suffers from breathing difficulties that preclude him from such activities as hunting with his son. Claimant also testified that his coal mine employment required him to do a lot of heavy lifting, including the lifting of seventy five to eighty pound jacks.

⁹In order to qualify for total disability under arterial blood gas studies, Claimant's pCO₂ value would have to be equal to or lower than the given pO₂ levels found in the "Qualifies" column of this chart.

e) *Discussion of the Total Disability Evidence*

My review of the record discloses that the evidence does not sustain a finding that Claimant is totally disabled under the Act. None of the pulmonary function studies or arterial blood gas studies of record produced qualifying values. Instead, Claimant relies upon the report of Dr. Hussain in an attempt to establish this element of entitlement. However, although Dr. Hussain diagnosed Claimant with a mild respiratory impairment, he also opined that Claimant retained the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. I find that Dr. Hussain's opinion does not establish total disability as it is defined under the federal regulations. See 20 C.F.R. § 718. 204(b)(1). Accordingly, I find that Claimant has failed to offer any evidence to support a finding that he is totally disabled.

4) Whether Total Disability Was Due to Pneumoconiosis

The amended regulations at Part 725 mandate that a miner is eligible for benefits if his "pneumoconiosis contributes to [his] total disability." 20 C.F.R. § 725.202(d)(2)(iv). A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. § 718.204(c). Because Claimant has not successfully established the threshold elements of presence of pneumoconiosis or total disability, analysis under this prong is unnecessary.

III. CONCLUSION

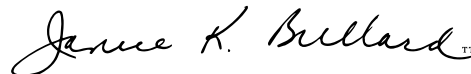
Based upon the foregoing, I find that Claimant has failed to establish that he is totally disabled due to pneumoconiosis. Accordingly, his claim for an award of benefits must be denied.

IV. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this claim, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of the claim.

ORDER

Claimant's claim for benefits under the Act is hereby DENIED.



Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondences should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481